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Supreme Court of the United States

OCTOBER TERM, 1942

No. 234

G. F. ALBIN,

Petitioner,

vs.

COWING PRESSURE RELIEVING JOINT COMPANY, AN UNINCORPORATED COMPANY, ETC., ET AL.,

Respondent.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

To the Honorable the Supreme Court of the United States:

By its opinion dated December 7, 1942 this Court has reversed and remanded this cause to the Circuit Court of Appeals for the Seventh Circuit without, however, determining the single (and simple) question of Federal law presented on this appeal.

It is respectfully and earnestly submitted on behalf of petitioner that this Court should itself decide this case *upon the merits.*

It was fully shown in the petition for certiorari that this case involves a question of Federal law, *i.e.*, whether Section 11 of the Bankrutcy Act of 1938 mandatorily requires the stay of State Court proceedings pending against an alleged bankrupt between the date of the filing of the petition in bankruptcy and the date of adjudication on such petition. It was upon this ground that this Court granted certiorari herein. The importance of this question was likewise stressed in the petition for certiorari.

That this Court does have ample jurisdiction to dispose of this case upon this issue of Federal law *upon its merits* has been determined by countless decisions of this Court; and such right is clearly granted to this Court by Sections 240 and 269 of the Judicial Code.

As said in *Donovan* v. *Pennsylvania Co.*, 199 U. S. 279 (p. 292): "As this case is before us on writ of certiorari, we can dispose of all questions arising on the record."

In the case of *Camp* v. *Gress*, 250 U. S. 308, this Court said (p. 318):

> "In cases coming from federal courts the Supreme Court is given by statute full power to enter such judgment or order as the nature of the appeal or writ of error (or certiorari, § 240 of the Judicial Code) requires. Revised Statutes, § 701. Circuit Court of Appeals Act of March 3, 1891, c. 517, § 11, 26 Stat. 826, 829. See also § 10 of the same act. Compare *Ballew* v. *United States*, 160 U. S. 187, 198, *et seq.* And by Act of February 26, 1919, c. 48, 40 Stat. 1181, amending § 269 of the Judicial Code, the duty is especially enjoined of giving judgment in appellate proceedings 'without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.'"

It is particularly appropriate that this Court exercise its power to dispose of the entire merits of a question of Federal law where the appeal is from an *interlocutory* order in the trial court. Interlocutory appeals reaching this Court under Section 129 of the Judicial Code have invariably been disposed of *upon the merits* in this Court. Each of the following cases involved an interlocutory appeal; and in each of them this Court decided the merits of the controversy.

Smith v. *Vulcan Iron Works*, 165 U. S. 518;
Mast, Foos & Co. v. *Stover Mfg. Co.*, 177 U. S. 485;
Metropolitan Water Co. v. *Kaw Valley Drainage District*, 223 U. S. 519;
Eagle Glass v. *Mfg. Co.* v. *Rowe*, 245 U. S. 275;
Meccano, Ltd. v. *Wanamaker*, 253 U. S. 136;
Deckert v. *Independence Corp.*, 311 U. S. 282.

The question presented on this appeal is one which arises very generally in bankruptcy proceedings. The Supreme Courts of the several States, as well as the Federal Courts, have been asked to pass upon the mandatory provisions of the Bankruptcy Act with regard to the stay of state court proceedings pending at the time the bankruptcy petition is filed and prior to adjudication. Since it is clear that this important question of Federal law can *never* reach this Court *except* upon an interlocutory appeal, it is additionally important that this Court pass upon the merits of this appeal at this time while it has the opportunity to do so.

The question as to whether a state court proceeding pending against an alleged bankrupt at the time the petition in bankruptcy was filed *must be stayed pending adjudication under Section 11 of the Bankruptcy Act of 1938* has been squarely presented in this case.

It is accordingly respectfully urged that this Court should decide this case upon the merits and should render an opinion accordingly.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 234.—October Term, 1942.

G. F. Albin, Petitioner, *vs.* Cowing Pressure Relieving Joint Company, etc., et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[December 7, 1942.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner filed an involuntary petition in bankruptcy against respondent who answered denying the allegations of the petition. Prior to adjudication, the bankruptcy court entered an *ex parte* order on petition of the same creditor restraining the prosecution by respondent or its agents of a suit in the Illinois state courts on a claim against one Fisher in which suit, it was alleged, Fisher had filed counterclaims which would exceed the amount of the respondent's claim. Thereafter on petition of respondent and after notice to all parties and a hearing the bankruptcy court vacated the restraining order. This likewise was, so far as appears, prior to an adjudication. Petitioner appealed. The Circuit Court of Appeals dismissed the appeal "for lack of jurisdiction." The case is here on certiorari.

Sec. 24(a) of the Chandler Act (52 Stat. 854, 11 U. S. C. § 47) gives the Circuit Courts of Appeals appellate jurisdiction from courts of bankruptcy "in proceedings in bankruptcy, either interlocutory or final". An order of the bankruptcy court vacating a restraining order against prosecution of a suit in a state court is, like a stay order itself, a proceeding in bankruptcy. See *Harrison Securities Co.* v. *Spinks Realty Co.*, 92 F. 2d 904; *Taylor* v. *Voss*, 271 U. S. 176, 181. The amendments to § 24(a) made by the Chandler Act practically abolished the distinction between appeals as of right and by leave. S. Rep. No. 1916, 75th Cong., 3d Sess., p. 4. And see *Dickinson Industrial Site, Inc.* v. *Cowan*, 309 U. S. 382, 385-388. Whatever may still be the possible limitations on the reviewability of interlocutory orders (see *In re Hotel*

Governor Clinton, Inc, 107 F. 2d 398; *Federal Land Bank* v. *Hansen,* 113 F. 2d 82, 84-85), no reason appears why this one cannot or should not be reviewed. Nor does it appear from the record which is before us that the issue is moot. We intimate no opinion on the merits. The judgment is reversed and the cause remanded to the Circuit Court of Appeals for proceedings in conformity with this opinion.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.